United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

APPEAL

75-6068

PETITION

75-4164

To be Argued by
ARTHUR S. OLICK

United States Court of Appeals

FOR THE SECOND CIRCUIT

SUN ENTERPRISES, LTD., SOUTHERN NEW YORK FISH AND GAME ASSOCIATION, INC., LYMAN E. KIPP, RICHARD E. HOMAN, NO BOTTOM MARSH AND BROWN BROOK,
Plaintiffs-Appellants,

—against—

RUSSELL E. TRAIN, *et al.*, ["Federal Defendants"],
Defendants-Appellees,

and

HERITAGE HILLS OF WESTCHESTER, *et al.*, ["Private Defendants"],
Intervenors.

SUN ENTERPRISES, LTD., SOUTHERN NEW YORK FISH AND GAME ASSOCIATION, INC., LYMAN E. KIPP, RICHARD E. HOMAN, NO BOTTOM MARSH AND BROWN BROOK,
Petitioners,

—against—

ADMINISTRATOR OF THE U. S. ENVIRONMENTAL PROTECTION AGENCY, RUSSELL E. TRAIN,
Respondent,

and

HERITAGE HILLS OF WESTCHESTER, *et al.*,
Intervenors.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
PETITION TO REVIEW ORDER OF UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BRIEF FOR INTERVENORS

UNITED STATES COURT OF APPEALS
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APPEAL NO. 75-6068

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BRIEF FOR INTERVENORS

Preliminary Statement

This is a consolidated proceeding involving (a) an appeal [No. 75-6068] from an order and judgment of the United States District Court for the Southern District of

New York (Bonsal, J.) dismissing as legally insufficient four of seventeen claims set forth in appellants' complaint and (b) an original petition [No. 75-4164] seeking review of a National Pollutant Discharge Elimination System ("NPDES") permit issued more than a year ago to Intervenors by the U. S. Environmental Protection Agency ("EPA") pursuant to section 402 of the Federal Water Pollution Control Act Amendments of 1972 [33 U.S.C. § 1342]. The appeal represents an attempt to review only that part of the decision of the District Court which dismissed appellants' claims against EPA and the U. S. Department of the Interior. The thirteen separate claims asserted against various agencies of the State of New York, the Town of Somers and the Intervenors and dismissed below are not now before this Court.

On September 30, 1975, this Court denied motions by the Intervenors, challenging the propriety of an interlocutory appeal at this time and to dismiss the petition as untimely, without prejudice to their renewal. The motions are now renewed. *See,* Points I and VI, *infra.*

Intervenors' Counter-Statement Of Issues Presented For Review

1. Does this Court have jurisdiction to review the EPA's issuance of an NPDES permit where review is sought more than ninety days after the issuance of the permit?

2. Where an NPDES permit is based upon substantial evidence and its issuance is neither arbitrary, capricious nor clearly erroneous may it be set aside by a reviewing court?

3. Did the District Court err in holding that it lacked jurisdiction to review the action of EPA in issuing an NPDES permit?

4. Did appellants have a reasonable opportunity to be heard in connection with the issuance of the NPDES permit to Intervenors?

5. Did EPA fail to comply with the Fish and Wildlife Coordination Act when the Department of the Interior, despite EPA's efforts to consult, declined to review the NPDES permit before it was issued?

6. Did the District Court correctly enter final judgment with respect to only four of seventeen claims asserted in the complaint?

Statement of the Case

Appellants brought suit in the District Court to enjoin the Intervenors from completing a 3,100-unit adult condominium development in the Town of Somers, New York. Suit was filed only *after* all necessary local, state and federal approvals had been obtained by Intervenors and *after* the development had substantially progressed. In all, seventeen separate claims were asserted in the complaint against the EPA and the Department of the Interior ["Federal Defendants"], the New York State Department of Environmental Control ("DEC") and the New York State Department of Transportation ["State Defendants"], the Town of Somers, its Zoning and Planning Boards, Building Inspector, Engineer and Highway Superintendent ["Town Defendants"] and the developers ["Private Defendants"].* At the inception of the litigation, the appellants moved for a preliminary injunction and all the defendants moved to dismiss the complaint for legal insufficiency and for summary judgment.

Appellants' application for injunctive relief was denied in its entirety and, on May 9, 1975, the District Court granted

*The Private Defendants are the Intervenors in these proceedings.

defendants' motions except as to a single claim against the Private Defendants. *See, Sun Enterprises, Ltd.* v. *Train,* 394 F. Supp. 211 (S.D.N.Y. 1975).* On July 24, 1975, the District Court, without notice to Intervenors, but with the consent of the U. S. Attorney, entered final judgment as to the Federal Defendants (1b).** Thereupon, appellants appealed to this Court and simultaneously filed their original petition seeking review of the NPDES permit.

The substance of the petition now before this Court repeats the substance of the first and fifth claims for relief set forth in appellants' complaint as against the Federal Defendants. The merits of these claims relate to the allegations that (a) the effluent limitations provided in the NPDES permit (1a) are inadequate and (b) the permit was issued without sufficient notice to appellants and without affording them ample opportunity to be heard. The first of these claims was dismissed by the District Court on the grounds that the District Court lacked subject matter jurisdiction because exclusive jurisdiction to review NPDES permits was vested in the Circuit Courts of Appeals by section 509(b)(1) of the Water Act [33 U.S.C. § 1369 (b)(1)]. The second of these claims was dismissed by the District Court on the merits. Apparently recognizing the

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*The District Court's opinion is printed at pp. A29-A58 of appellants' appendix. The single remaining claim involves the allegation that the Private Defendants have discharged dredge and fill material into an alleged navigable stream ["Brown Brook"] without a permit from the Army Corps of Engineers. The District Court found disputed facts incident to this claim and with respect to defenses of *laches* and reliance upon the Corps' then existing policy of refusing to entertain applications for such permits on the grounds that intermittent streams like Brown Brook were not "navigable" waters. Trial is anticipated early next year.

**References to pages prefaced by "A" are to the appendix contained in the appellants' brief; references to pages suffixed by "a" are to the appendix contained in the brief of the federal appellees; references to pages suffixed by "b" are to the Appendix of Intervenors.

validity of the District Court's ruling, appellants not only appeal from the dismissal of their first and fifth claims, but they have filed an original petition as well.

The two remaining claims asserted against the Federal Defendants and dismissed below relate to the alleged failure of EPA to "consult" with Interior relative to the impact on fish and wildlife of the NPDES permit ultimately issued to Intervenors as required by the Fish and Wildlife Coordination Act [16 U.S.C. § 661 *et seq.*] and Interiors' alleged failure to enforce the Migratory Bird Treaty Act [16 U.S.C. § 703 *et seq.*]. Appellants press their appeal as to the Coordination Act, but they have abandoned their claim under the Migratory Bird Act.

The Statutory Context

The federal law respecting water pollution control is contained in the Federal Water Pollution Control Act ("Water Act") and, in particular, the Water Act amendments of 1972 [33 U.S.C. § 1251 *et seq.*, as added Oct. 18, 1972, Pub. L. No. 92-500, 86 Stat. 816]. The Water Act regulates, *inter alia,* discharges of pollutants from point sources and the disposal of dredged and fill materials. Separate regulatory schemes are established for those discharging directly into navigable waters and those discharging pollutants into publicly owned treatment facilities.

Persons discharging directly into navigable waters are subject to both effluent standards and water quality standards. The former are limitations on the *amounts* of pollutants that may be discharged based on the best available pollution control technology. The latter consist of rules defining a required quality for ambient water based upon technical data as to minimum requirements to sustain various water uses. The discharge of pollutants is not *prohibited* by law, but subjected to *regulation.* The regulatory

standards are those established by EPA although EPA is authorized by statute to adopt existing state standards in its discretion [33 U.S.C. §§ 1311(b), 1313, 1314]. The legislative history of the Water Act establishes Congress' intention that EPA will defer to State authorities in those jurisdictions, such as New York, which enact regulatory programs designed to adequately protect the environment. *See,* Conf. Rep. No. 92-1236, 92d Cong., 2d Sess. 138-140 (1972).*

The mechanism established by Congress to secure enforcement is a permit system. EPA is authorized to issue permits [NPDES permits] to dischargers, which establish the maximum permissible levels of pollutant discharge [33 U.S.C. § 1342(a)]. States having permit programs which meet federal standards are delegated the authority to issue federal permits subject to EPA review [33 U.S.C. § 1342(b)-(f)].**

Effluent standards are essentially measurements of permissible concentrations of pollutants that may be discharged in a given time period. These standards are based on the availability of technology to control the effluent and, in some cases, on an assessment of the effect of the pollutant in the body of receiving water. Water quality standards, by way of contrast, circumscribe the quality for particular bodies of water depending upon designated use.

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*A Legislative History of the Water Pollution Control Act Amendments of 1972 prepared by the Congressional Research Service of the Library of Congress has been published in two volumes by the Government Printing Office (Ser. No. 93-1).

**Effective October 28, 1975 New York State and its Department of Environmental Control were found to have effective permit programs and were delegated the authority to issue NPDES permits. New York has had enforceable water quality standards since 1950 and has administered a State discharge permit system since 1962. Effective September 1, 1973 New York instituted a State Pollutant Discharge Elimination System permit program pursuant to Article 17 of the Environmental Conservation Law. N. Y. Environmental Conservation Law (McKinney, Supp. 1975).

The distinction between effluent standards and water quality standards was described in the Senate Report on the 1972 amendments to the Water Act as follows:

> "Unlike its predecessor [water quality standards] which permitted the discharge of certain amounts of pollutants . . ., this legislation would clearly establish that no one has the right to pollute—that pollution continues because of technological limits, not because of any inherent right to use the nation's waterways for the purpose of disposing of wastes." S. Rep. No. 92-414, 92d Cong., 1st Sess. 42 (1971).

Thus, the basic statutory scheme requires all dischargers to conform to technologically based effluent standards. Recognizing that technology changes over time, the statute requires discharges to meet two levels of effluent standards —one by July 1, 1977 and the second by July 1, 1983. Significantly, the 1977 level is defined as the "best *practicable* control technology currently available" whereas the 1983 level is defined as "the best available technology *economically achievable*" [33 U.S.C. §§ 1311(b)(1)(A), 1311(b)(2)(A), emphasis added]. The ultimate goal of the statute is the complete elimination of pollution by 1985 [33 U.S.C. § 1251(a)(1)].

Congress recognized not only the vicissitudes of pollution technology, but its complexity as well. The EPA was directed to issue regulations defining the attainable degree of effluent reduction and to "specify factors to be taken into account in determining the control measures and practices" applicable to point sources [33 U.S.C. § 1314(b)(1)(B)]. While Congress intended that "effluent limitations applicable to individual point sources within a given category or class be as uniform as possible" [Conf. Rep. No. 92-1236, 92d Cong., 2d Sess. 126 (1972)], EPA was authorized to consider the technical differences in standards among indus-

tries and within industries as well as "such other factors as the Administrator deems appropriate" [33 U.S.C. §§ 1314(b)(1)(B), (b)(2)(B)]. In short, broad discretion was vested in the EPA in the administration of the Water Act and in the ultimate achievement of its goals.

EPA is empowered to set the required effluent levels, and dischargers are free to meet those levels with whatever technical means are available; no discharger is required to adopt a particular control technology so long as the discharger meets prescribed effluent limitations or standards of performance [33 U.S.C. §§ 1311, 1316]. Nevertheless, EPA must consider control technology to ascertain whether a proposed effluent limitation or standard of performance is achievable [33 U.S.C. §§ 1314(b)(1)(B), (b)(2)(B), (b)(3), (c)]. *See,* Conf. Rep. No. 92-1236, 92d Cong., 2d Sess. 128 (1972); H. R. Rep. No. 92-911, 92d Cong., 2d Sess. 107 (1972).

The primary statutory reliance on a permit program is reinforced by extensive compliance provisions. EPA is specifically empowered to enforce, by both civil and criminal means, the effluent limitations of its NPDES permits and of permits issued by State authorities under approved programs [33 U.S.C. § 1319]. Moreover, specific provision is made for citizen participation in the enforcement of contol requirements and regulations created in the Water Act. Not only may citizens sue to compel EPA to perform its duties, but citizens may also initiate civil suits against those who violate prescribed effluent limitations [33 U.S.C. § 1365]. Review of EPA's actions in prescribing particular effluent limitations or standards of performance or in granting or denying permits is available in the Circuit Courts of Appeals [33 U.S.C. § 1369(b)(1)] while jurisdiction over other citizen suits is vested in the District Courts [33 U.S.C. § 1365(a)]. Significantly, standing to sue has been extended by the statute to all "persons having an inter-

est which is or may be adversely affected" [33 U.S.C. § 1365(g)]. Congress intended by this action to enact into law the decision of the Supreme Court in *Sierra Club* v. *Morton* 405 U.S. 727 (1972). Conf. Rep. No. 92-1236, 92d Cong., 2d Sess. 146 (1972).*

The Factual Context

A. The *Dramatis Personae*

This litigation is basically a controversy between two riparian owners of real property in the Westchester County Town of Somers. The Intervenors are Henry Paparazzo, Curtis McGann, Heritage Hills of Westchester, H & H Land Corp., Heritage Hills Development Group Inc. and Heritage Hills Sewage Works Corporation known collectively as the "private defendants" (4b-7b). Paparazzo and McGann are the principals of the partnership known as Heritage Hills of Westchester and of the various corporations named as parties defendant. The private defendants are engaged in constructing over a period of seven to nine years the Heritage Hills adult condominium project in Somers consisting of some 3,100 units, including extensive recreational facilities and the sewage treatment plant for which the NPDES permit underlying appellants' complaint was issued (12b). The private defendants have already expended some $23,000,000 on the project (26b). As of November 20, 1975, 120 condominium units are actually occupied and an additional 8 units are under contract to be closed prior to the end of the current year. As of the date hereof 339 units are complete or in a state of substantial completion.

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*It is submitted that neither "Brown Brook" nor "No Bottom Marsh" are "persons" within the meaning of the Water Act and, therefore, do not have standing to sue. Nevertheless, appellants Kipp and Sun are clearly within the scope of the statute and are vested with the requisite standing to raise the issues sought to be presented to this Court.

Appellants-petitioners consist of a neighboring landowner ("Kipp"), his corporate *alter ego* ("Sun Enterprises"), his friend and tenant ("Homan"), the friend's fishing and hunting club ("Southern New York"), a marsh ("No Bottom") and a stream ("Brown Brook") (8b, Petition para. 4). The neighboring landowner, through his corporate *alter ego,* owns the marsh and part of the stream and permits his friend to lease the property for occasional use by customers of the latter's bait and tackle shop (Petition para. 4). The adjoining landowner has long operated a gravel pit on his property and, more recently, sought to develop the property for residential purposes similar to the Heritage Hills project (8b-12b). Failing in this, the adjoining landowner embarked on a program of harassment, vilification and litigation in an effort to frustrate Intervenors' project. In the locus of appellants' property, and since 1960, hundreds of thousands of cubic yards of gravel and sand have been extracted and used in the construction of Route 22, Hawthorne Circle, and Interstate Route 684. Appellant Sun acquired approximately 110 acres in 1963 and concedes that it extracted an average of 50,000 cubic yards each year since at least 1967 (8b-12b, 35b-36b). Accordingly, a mound of gravel and sand which originally rose some 33 feet above the surrounding marshland was removed to form a five-acre lake ("Sun Lake") and by reason of Sun's gravel operations, the lake was enlarged to about 10 acres and to a depth of 40 feet. South of the lake, Sun has excavated gravel and sand over an additional 49 acres (36b). Thus, contrary to appellants' contention, Sun Lake is not a natural, spring-fed body of water and Sun's "wetlands" and "swamp" are not the natural habitat of wildlife (38b).

The appellee-respondent is the Administrator of the EPA who issued an NPDES permit to the private defendants so that their project could proceed. Joined as

an appellee with the Administrator in the companion appeal is the Secretary of the Interior who is alleged to have violated his statutory duty in refusing to review the NPDES permit application when asked by the Administrator to do so.

B. The Chronology

The chronology of events discloses careful scrutiny by municipal, state and federal agencies at each stage of the Heritage Hills project. On June 29, 1972, the Town of Somers amended its zoning ordinance to permit designed residential development pursuant to special exception use permits on tracts of land of at least 500 acres (14b). Prior to the enactment of the designed residential development district, the Town of Somers undertook extended studies of the proposed enabling amendments to its ordinance and engaged professional consultants to assist it. In consultation and cooperation with the Town, its consultants and its various boards and agencies, regulations were formulated to insure the creative use of land, the preservation of open spaces, innovation, flexibility and variety in the type, design and layout of residential developments and to provide for community social, recreational, cultural and other service facilities as integral parts of newly constructed residential communities.

The enabling ordinance required a three-stage application procedure. First, the Somers Zoning Board of Appeals was required to hold a public hearing in connection with a general land use and development plan. Second, the Somers Planning Board was required to hold a public hearing with respect to any subdivision of the land within the proposed designed residential development district. Third, the planning board, the Town engineer, the superintendent of highways, and the Town attorney for the Town of Somers each were required to review the site development plan.

Shortly after the enactment of the amendments to the Somers zoning ordinance, Intervenors applied for a special exception use permit for their Heritage Hills project. Comprehensive hearings in which appellants participated were held before the Somers Zoning Board on September 23, October 5 and October 21, 1972. Thereafter, on November 21, 1972, Intervenors were granted a special exception use permit permitting them to proceed with their project, conditioned specifically upon the protection and preservation of Brown Brook and the adjoining wetland areas.

The Somers permit required Intervenors to install, at their own expense, all facilities for water and sewage, interior roads and driveways, drainage, lighting, fire hydrants, etc. (17b, 45b). Accordingly, it was necessary for Intervenors to secure a variety of approvals from various local, state and federal authorities. Most significantly, in order to construct and install a water supply system and a sewage system, Intervenors were required to secure permission from the DEC.

On April 26, 1973, Intervenors made application to DEC for approval of their acquisition of a source of water supply by the construction of wells and for their plans to install a complete water supply and distribution system for water service to Heritage Hills. Intervenors filed two additional applications on July 12, 1973 involving Brown Brook to permit relocation of approximately 650 feet of the stream channel to permit the construction of the sewage treatment plant and a dam. Notice of these applications was published in the northern Westchester edition of the *Reporter Dispatch* on August 23 and 30, 1973 and extensive hearings were held before the DEC on September 17, 18 and 19, 1973 and October 2, 3, 4, 5, 9 and 10, 1973 resulting in a transcript of 1,526 pages (41b). On January 11, 1974, the DEC hearing officer recommended approval

of the applications in a written report of 11 pages and on January 17, 1974 the Commissioner of the DEC approved the hearing officer's report (41b-55b).

The DEC found, *inter alia,* that (a) Intervenors had established that their plans made equitable provision for the determination and payment of any and all legal damages to persons and property, both direct and indirect, which might result from execution of their plans for acquiring land; (b) that the proposed sewage treatment plant would not endanger the health, safety and welfare of the people of the State of New York; and (c) that the proposed sewage treatment plant would not cause unreasonable, uncontrolled or unnecessary damage to the natural resources of the State of New York, including soil, forests, water, fish and aquatic and land-related environment.

During the same time as DEC was considering Intervenors' applications for permission to proceed with the sewage treatment plant and for the relocation of Brown Brook, the Town of Somers approved the establishment of a separate Heritage Hills sewer district (18b).

In addition, Intervenors made application on October 10, 1973 for a New York State Pollutant Effluent Discharge Elimination System permit ("SPDES").* The SPDES permit application was reviewed by DEC's Division of Pure Waters and its Bureau of Sewage Programs. Notice of the SPDES permit application was duly published by DEC in the northern Westchester edition of the *Reporter Dispatch* in December, 1973.**

While its applications for various DEC approvals were still pending, Intervenors, on December 27, 1973, filed an application with EPA for an NPDES permit. By letter,

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*New York's permit program first became effective September 1, 1973 while the applications for the water source, stream relocation and sewage plant construction were pending.

**Affidavit of William Garvey of DEC sworn to 2/13/75 at p. 3.

dated January 17, 1974 (A3), EPA advised DEC of its receipt of the NPDES permit application and requested DEC certification pursuant to section 401 of the Water Act [33 U.S.C. § 1341] that the proposed discharges would comply with the applicable provisions of sections 301, 302, 306 and 307 of the Water Act.

Concurrently with the request for certification, EPA published notice of its intent to issue an NPDES permit to the Intervenors in the *Peekskill Star,* a newspaper of general circulation in northern Westchester County (57b-60b). EPA's notice was published on or about April 30, 1974 (57b). Thereafter, on May 2, 1974, DEC published notice in the northern Westchester edition of the *Reporter Dispatch* that Intervenors had filed an application for an NPDES permit and that DEC had been requested to issue the certification required by section 401 of the Water Act (61b).

After receipt of the NPDES permit application, EPA's Facilities Technology Division drafted a proposed permit (18a). The draft permit, as prepared by EPA, was forwarded to DEC for its consideration together with the request for certification (A3, 18a). On April 5, 1974, DEC notified EPA of its intention to issue the requisite certification and forwarded to EPA a draft of DEC's proposed SPDES permit (63b). DEC also forwarded to EPA letters it had received from various parties in interest concerning the SPDES application and advised EPA that, after reviewing the hearing record relative to Intervenors' application for a water supply and effluent discharge structure, no further public hearing was contemplated (64b).

At the same time that EPA forwarded Intervenors' application for an NPDES permit to DEC for certification, EPA forwarded copies of the application to the Department of Interior and to the United States Army Corps of Engineers for their comments (19a). Both the

Interior Department and the Corps of Engineers declined substantive comment (A17).

On June 12, 1974, DEC certified that the discharge proposed by Intervenors of sewage effluent into Brown Brook would comply with the applicable provisions of sections 301, 302, 306 and 307 of the Water Act and the classifications and standards governing the quality and purity of waters of New York State in accordance with Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (A20). In its certification, DEC prescribed specific effluent limitations to be incorporated in the NPDES permit. In consequence, EPA, on July 9, 1974, effective July 12, 1974, issued to the Intervenors the NPDES permit which appellants now seek to invalidate (1a).

C. The Active Participation Of The Appellants In The Administrative Process

Appellants have participated in every stage of the administrative process incident to Intervenors' project. They participated in the proceedings incident to the amendment of the Somers zoning ordinance (15b); they participated in the proceedings involving Intervenors' application for a special use permit (16b); they participated in the public hearings incident to petitioner's applications for approval of their water supply, the sewage treatment plant and the relocation of Brown Brook (43b); they participated in Intervenors' application for the SPDES permit (81b); and they participated in Intervenors' application for the NPDES permit (A12).

The administrative record herein is replete with protests from Kipp and Sun, which are identical to the substantive objections raised both in the petition for review and in the complaint underlying the present appeal.

In June and July of 1972, Intervenors submitted their proposed plans for the sewage treatment facilities to the

Town authorities in Somers. They also submitted their plans to the Bureau of Water Supply of the City of New York and to the Westchester County Department of Health. Protests by Kipp were filed with Town, City and County authorities. On October 11, 1972, an attorney representing appellants Kipp and Sun wrote to the various Somers Town authorities concerning the discharge of effluents into Brown Brook by the proposed sewage treatment plant and offered a portion of the Sun property to the Intervenors for purposes of the construction of the plant so that the Sun property, which would ultimately be developed in a similar fashion, could benefit (67b). Appellant Kipp himself protested to the Westchester County Department of Health and to the DEC, both orally and in writing, that the proposed sewage treatment plant would cause pollution and destroy his water supply (71b).

Following careful review by the Westchester County Department of Health, the City of New York and its own engineers, and after conducting a public hearing in which Kipp participated, the Somers Zoning Board, on November 21, 1972, granted Intervenors the special use permit for the Heritage Hills project (15b). Kipp then focused his fire on the DEC.

On March 22, 1973, Kipp notified Intervenors that he demanded that they "cease and desist" from polluting Brown Brook and the "wetlands" on the Sun property (75b). Copies of this demand were sent to DEC as well as to Town and County officials. On June 27, 1973, Kipp's attorney advised DEC that Sun opposed Intervenors' application for leave to construct a sewage treatment plant and, more specifically, "the use of Brown Brook and the Sun Enterprises Ltd. wetland for the deposit of 700,000 gallons daily of storm drainage water and sewage effluent" (A59).* Counsel advised DEC that as lower riparian landowner,

*The 700,000 gallons is the estimated volume generated by all 3,100 units to be erected over seven to nine years.

Sun would set aside an acre of its own property downstream from the Heritage Hills property for the construction of the sewage treatment plant so that both the Heritage Hills and Sun properties could jointly benefit (A59). Clearly, Kipp was initially motivated by a desire to develop his own property commercially and not by any concern for the environment. Only when his efforts to compel relocation of the sewage treatment plant proved unavailing did he express concern about pollution.

In numerous conversations and letters to DEC, Kipp demanded a public hearing with respect to Intervenors' applications. The hearing was demanded so that Kipp could present his claims that the sewage treatment plant, as proposed by Intervenors, would flood the Sun property and destroy the environment through the discharge of excessive quantities of pollutants. Kipp's request for a hearing was granted by DEC and Kipp was afforded the right to participate, a right which he readily and fully embraced.

When the DEC hearings were commenced on September 17, 1973, Kipp's attorney appeared on behalf of Sun Enterprises and promptly objected to the public notice on the grounds that it was unfair and misleading (Tr. 8-16).* His counsel then proceeded to state that Sun did not oppose the Heritage Hills project, but, rather, urged consideration of alternate sites for the sewage treatment plant (Tr. 162-179). When witnesses were called to testify on behalf of Intervenors, Kipp's attorney was permitted to cross-examine and also actively participated in the presentation of direct evidence before the hearing officer (Tr. 107, 204, 279, 546, 646, 835, 969). Most particularly, counsel for Kipp examined witnesses with respect to all of the "environmental" matters raised in these proceedings,

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*References preceded by "Tr." are to the pages of the transcript of the public hearing held before DEC hearing officer Dickenson, a copy of which is being filed by Intervenors as part of its answer to the petition for review and as part of the administrative record of proceedings below.

including the details of construction of the proposed sewage treatment plant, the levels of phosphates and nitrates in the proposed effluent discharge and the nature and extent of the effluents proposed to be discharged into Brown Brook (Tr. 204, 1330-A, 1435-42, 1358-60). Counsel also examined numerous witnesses with respect to the effect of the proposed effluent discharge on Brown Brook (Tr. 820-2, 951-4) and on the Sun property and the location of water supply facilities on the Sun property (Tr. 969).

Further, counsel's interrogation covered the quality of water in Brown Brook, the effect the proposed effluent discharge would have on that quality, the existence of wells and an aquifer on the Sun property, and testing procedures and control procedures incident to the operation of the proposed sewage treatment plant (Tr. 274-7, 300, 374, 480, 483). In short, all of the issues respecting the adequacy of the effluent limitations contained in the NPDES permit and asserted here as "new grounds" were raised at the public hearing.

At the hearing held on October 6, 1973, Kipp's attorney proposed that still another hearing be held to deal more specifically with the location of the sewage treatment plant and the discharge of effluent into Brown Brook (Tr. 1151). He proposed, in effect, that a SPDES hearing be held (Tr. 1151-7). Counsel for Intervenors noted that the testimony adduced both directly and on cross-examination at the hearings then being conducted was unrestricted and had covered all of the subjects that would be covered in a SPDES hearing (Tr. 1147-63). The hearing officer agreed and denied the application of Kipp's attorney to close the then pending hearing and to open a SPDES hearing (Tr. 1182-4). However, he specifically afforded Kipp the opportunity to present, without any restriction whatsoever, such other and further evidence as he might deem relevant to *any* matter involving Heritage Hills (Tr. 1215-1494).

Availing himself of this opportunity, Kipp's attorney presented the exact evidence that would be relevant to a SPDES hearing, both documentary and testamentary, respecting Kipp's contention that the proposed sewage treatment plant would pollute Brown Brook and irreparably damage the environment (Tr. 1215-1494). Kipp's attorney presented evidence concerning water quality tests and stream flow tests conducted in Brown Brook and on the Sun property and expert testimony supporting Kipp's contentions. This evidence included the testimony of Dr. Raul Cardenas, Jr., whose affidavits (A84-A91) were submitted to the District Court in an effort to establish the inadequacy of the effluent limitations contained in the NPDES permit (Tr. 1403-1485).

In his written report to the Commissioner, following the closing of the hearings, the hearing officer acknowledged that Kipp had filed objections:

> ". . . contending that the sewage effluent from the proposed sewage treatment plant and sewage effluent discharge structure and storm water drainage from the project would have detrimental effects to [the Sun] property due to the quality and quantity of the effluent" (44b).

After carefully analyzing the voluminous record and the plethora of scientific data presented by both proponents and opponents of the project, the hearing officer made findings concerning the effluent discharge and concluded that "the construction of the sewage effluent discharge structure will not result in any degradation of Brown Brook" and that "the proposals for the construction of the . . . sewage effluent discharge structure and relocation of the stream . . . will not cause unreasonable, uncontrolled or unnecessary damage to the natural resources of the State, including soil, forests, water, fish and aquatic and land-related environ-

ment" (49b, 55b). The hearing officer's report was reviewed by the Commissioner of the DEC and, upon such review, approved in its entirety (55b).

While waiting for DEC's decision respecting Intervenors' applications for permission to proceed with the sewage treatment plant, Kipp, both directly and through his attorney, continued to protest to Town, County and State authorities that the Heritage Hills project was destroying the environment (A2, A10, A12, A24, 71b-87b). At his insistence, numerous inspections of the project were made and intensive review and consideration was given every step of the way. Repeatedly, the Intervenors were visted by municipal, county and state inspectors. Repeatedly, Kipp's unfounded complaints were rejected.

Characteristic of Kipp's activities is his letter of January 21, 1974 to the DEC in which he complained that DEC had been "notified dozens of times by telephone and letters" that the Sun property was being polluted by the Heritage Hills project (83b). DEC replied on January 22, 1974 (85b) that:

> "... this Department ... has repeatedly investigated your charges of water quality contravention as the result of Heritage practices. I can only say that such claims were not substantiated by factual evidence, nor were they adequately established by your expert witnesses during the course of our nine days of public hearing."

By January 1974, Kipp was complaining that DEC's responses were "self-serving" and "evasive" and designed as "a cover-up of conditions regarding the destructive erosion of molt, mud, silt, topsoil, etc., from 'Heritage Hills' development north of Route 202, Somers, N. Y., via the 'Brown' Brook into 'Sun' downstream ('Brown' Brook) wetlands, water reservoir, well area and the 'Sun' large

plateau area . . ." (87b). In a letter to DEC, dated January 28, 1974, Kipp accused DEC of ignoring the evidence of his expert witnesses who appeared at the public hearing and who, according to Kipp, "specifically and thoroughly covered the erosion, pollution, siltation, etc., that we have objected to for months—since March 22, 1973 by our letters and calls to your environmental department—without any action" (87b).

On May 2, 1974, DEC published notice of Intervenors' application for the NPDES permit and of its intention to make the certification required by section 401 of the Water Act (61b). The public notice requested persons interested in the application who wished to become a "party in interest" to notify DEC on or before May 27, 1974 of their specific areas of interest. A week before the deadline, on May 20, 1974, Kipp advised DEC that Sun was a "party in interest" and that he opposed the "application for discharge of pollutant sewage into the Brown Brook" (A10). More specifically, Kipp protested that the Intervenors' proposal would destroy the Sun property, its wetlands and lake areas and water supply by using the Sun property "as a sewage pollutant water storage . . . surge basin without a license to use our lands and water bodies" (A11). Kipp requested another public hearing which request was declined by DEC on the grounds that:

> ". . . the rather extensive and comprehensive hearings conducted during the Fall of last year regarding the proposed development sufficiently answered all questions presented at that time and that the comments that we have received to this date on this application are basically a restatement of questions posed at that time" (A22).

Failing to pursuade the Town of Somers, the County of Westchester and the DEC that Intervenors' proposal for

a sewage treatment plant should be rejected, Kipp turned his attention to EPA. Whereas DEC, as early as April 5, 1974 (A77), called EPA's attention to Kipp's position and forwarded to EPA the letter from Kipp's attorney of January 11, 1974, Kipp's first direct communication to EPA appears to have been on May 28, 1974 (A12). By letter of that date, Kipp reiterated to EPA, in detail, his objection to the Heritage Hills project and complained about the dangers to the environment inherent in the proposed effluent discharge from Intervenors' sewage treatment plant. The gravamen of his complaint is contained in his statement that:

> "We strongly object to the proposed disposal of Heritage Hills sewage waste water into our lands via the Brown Brook and sincerely ask that your Federal Agency take action by your power to legally prevent the destruction, by flooding and pollution, of the pure waters on our lands."

Significantly, while Kipp's letter of May 28, 1974 asked that the EPA "register this notice of protest and then take the necessary steps at your federal environmental level to prevent the destruction of these lands and water supply of all the downstream owners along the Brown Brook from this Heritage Hills sewage plant pollution discharge as proposed," Kipp never requested EPA to hold a public hearing. Nevertheless, Kipp's complaint was given careful consideration by EPA, which, after consulting with DEC, concluded that no public hearing was necessary because "all of Mr. Kipp's questions and objections, which were raised in his letters of May 20 and May 28, 1974, were answered during a public hearing held by the State of New York when the H & H Land Corp. applied for a water supply permit" (A14). EPA's review of the DEC proceedings and, in particular, of the findings made after the state public hear-

ing, inevitably led to the conclusion that nothing new was being offered (A15).

It is not clear when appellants first learned of the actual issuance of the NPDES permit although the record discloses that they were aware of its pendency virtually from the time of its original filing. The record does disclose, however, that appellants were advised of the permit and of the conditions contained therein by letter from DEC, dated August 5, 1974 (A26) and were again specifically notified of the actual issuance of the NPDES permit as well as the date of its issuance by letter from DEC, dated September 3, 1974 (A28).

Appellants made no effort to review judicially the DEC determinations regarding the application of Intervenors for leave to construct their sewage treatment plant or with respect to the certification required by section 401 of the Water Act. Such review specifically was available to appellants under sections 15-0905 and 17-0909 of the New York State Environmental Conservation Law (McKinney, 1973). Appellants did institute an action in the New York State courts against DEC on or about August 16, 1974 seeking to compel DEC to hold a hearing with respect to the Intervenors' application for a SPDES permit, but discontinued the action before adjudication because it was filed too late.

D. The NPDES Permit

The NPDES permit issued by EPA on July 9, 1974 (1a) fully protects the environment, contains specific limitations with respect to the quantities of effluents which may be discharged by Intervenors, as permitees, and numerous conditions which must be met in order to fulfil the requirements of the Water Act. The effluent limitations contained in the permit were developed carefully from applicable federal and state water quality requirements (18a). The particular permit here at issue relates to a newly designed and constructed facility rather than to an

existing sewage treatment plant and the prescribed limitations are much stricter than those otherwise imposed (18a).

Significantly, the permit, issued for a period of five years, specifically reserves EPA's right, after notice and opportunity for a hearing, to modify, suspend or revoke the permit in the event of "a change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge." Further, in the event a more restrictive effluent standard or prohibition is established under section 307(a) of the Water Act, the permit may be revised or modified to reflect such standard.

Intervenors are required to furnish extensive monitoring reports to both DEC and EPA and are not relieved of any civil or criminal liability for violation of the Water Act, for infringement upon the rights of neighboring riparian owners or for violation of the permit restrictions. Clearly, the permit, by its very terms, is severely restrictive and provides ample means for environmental protection. It incorporates the latest technology as determined by the environmental experts employed both by DEC and EPA and their best judgment after careful consideration.

Whereas the NPDES permit was issued on July 9, 1974 Intervenors' sewage treatment plant did not become operational until April 10, 1975 (93b). Thereafter, under condition C-2 of the Special Conditions of the permit (16a), Intervenors had three months until July 10, 1975 to comply with the permit's effluent limitations.*

ARGUMENT

POINT I

THE PETITION FOR REVIEW IS TIME BARRED.

Petitioners-appellants seek judicial review of the NPDES permit issued to Intervenors by EPA pursuant

*Complaints by appellants prior to April 10, 1975 that Intervenors were "polluting" Brown Brook were therefore unfounded.

to section 509(b)(1) of the Water Act [33 U.S.C. § 1369(b)(1)]. They seek to void the permit or, alternatively, to compel EPA to reopen the proceedings "to hear further evidence."

Section 509(b)(1) of the Water Act vests original jurisdiction in the Circuit Courts of Appeals to review EPA action in promulgating effluent standards and standards of performance in connection with the issuance of NPDES permits. However, the statute specifically provides that application for review "shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day."

Here, the NPDES permit which petitioners seek to void was issued on July 9, 1974 (1a). The petition was filed on July 31, 1975, more than one year later. Thus, it is time barred and this Court is without jurisdiction to consider its merits.

Section 509(b)(1) is jurisdictional and must be strictly construed to effectuate its manifest purpose. Congress recognized the need to establish "a clear and orderly process for judicial review" and was concerned lest review "unduly impede enforcement." H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 136 (1972). Congress deliberately provided for review "within controlled time periods" and, "to maintain the integrity of the time sequences. . .," required that "any review sought must be filed within [90] days of the date of the challenged promulgation or other action." S. Rep. No. 92-414, 92d Cong., 1st Sess. 85 (1971).* Section 509(b)(1) is modeled after the review provisions of the Clean Air Act Amendments of 1970 [42 U.S.C. § 1857] and reflects a general Congressional policy strictly to limit

*The House version of the bill originally contained a 30-day limitation period. This was changed in Conference with the Senate to 90 days. Conf. Rep. No. 92-1236, 92d Cong., 2d Sess. 148 (1972).

judicial review of agency action in the environmental field to proceedings which are commenced expeditiously and not as an afterthought.

The jurisdictional nature of section 509(b)(1) was clearly delineated in *Peabody Coal Company* v. *Train,* 518 F.2d 940 (6th Cir. 1975) where a petition to review an EPA determination with regard to a State permit program was dismissed as untimely because it was filed a mere 92 days after the agency action of which review was sought. Here, the petition was filed 387 days after the issuance of the permit. The Court in *Peabody* nevertheless held the petition there untimely:

> "The legislative history of this Act shows that Congress desired a clear and prompt time schedule for applications for judicial review. S. Rep. No. 92-414, 92d Cong., 2d Sess., 1972 U. S. Code Cong. & Admin. News pp. 3668, 3750-51. The judicial review provisions as originally drafted in both H. R. 11896 § 509 and S. 2770 § 509 provided for a 30-day time limit in which to file a petition for review. In the final version the time limit was extended to 90 days, but the emphasis upon specific time limitation remained.
>
> We believe the sense of urgency concerning environmental protection portrayed in the Act we now construe was equally present in the Clean Air Act, *See* 42 U. S. C. §§ 1857 and 1857h-5(b)(1) (1970), and that cases enforcing the statutory time limits contained therein are precedent for our present decision. *Granite City Steel Co.* v. *EPA,* 501 F. 2d 925 (7th Cir. 1974). *See also Union Electric Co.* v. *EPA,* 515 F. 2d 206 (8th Cir. 1975); *Getty Oil Co. (Eastern Operations)* v. *Ruckelshaus,* 467 F. 2d 349 (3d Cir. 1972), *cert. denied,* 409 U. S. 1125 93 S. Ct. 937, 35 L. Ed. 2d 256 (1973)." *Id.* at 943.

Of similar import are the District of Columbia Circuit's ruling in *Oljato Chapter of the Navajo Tribe* v. *Train,* 515 F.2d 654, 659 (D.C. Cir. 1975) and this Court's ruling in *Associated Industries of N. Y. State, Inc.* v. *U. S. Dept. of Labor,* 487 F.2d 342, 345 n.1 (2d Cir. 1973).

Recognizing the unavoidable jurisdictional infirmity of their position, petitioners contend they qualify under the "savings clause" of section 509(b)(1) which permits the filing of an otherwise untimely petition where it is based *solely* on grounds which arose after the ninetieth day. Petitioners assert four grounds for review, all of which were available to them at the time the permit was issued. First, petitioners claim they received no notice of the issuance of the NPDES permit. Second, they claim that in issuing the permit EPA failed to consult with the Interior Department as required by the Fish and Wildlife Coordination Act [16 U.S.C. § 661 *et seq.*]. Third, they claim that in issuing the permit EPA ignored the impact of the prescribed effluent limitations on the wetlands of No Bottom Marsh. Finally, petitioners contend that in issuing the permit EPA failed to consider the presence of an aquifer, water supply, fishing area and marsh downstream from Intervenors' discharge pipe.

The major grounds asserted as the basis for judicial review of the NPDES permit are inherent in the permit itself and all grounds were present and known to the petitioners or could, with reasonable diligence, have been known to them, within ninety days after the NPDES permit was issued. Whereas, EPA was not required to give petitioners personal notice of its intention to issue the permit and gave adequate notice by publication of the proceedings* the fact is that petitioners had *actual* notice of the issuance of the permit as early as August 5, 1974 and no later than September 3, 1974 (A28). That they waited almost a year

See, Point IV *infra.*

to petition for review after they actually knew of the issuance of the permit is inexcusable.

Equally inexcusable is their delay in asserting that the permit is void because Interior declined the opportunity to "consult" with EPA before the permit issued. Interior's declination was given to EPA in writing on May 29, 1974 (A17) and was part of the administrative record available to petitioners had they bothered to inquire. That they made their inquiry long after the expiration of the 90-day statutory period and more than 90 days after they had actual notice of the issuance of the permit is no excuse. They are barred by their own laches.* *Sobosle* v. *U. S. Steel Corp.*, 359 F.2d 7 (3d Cir. 1966); *Clark* v. *Volpe*, 342 F.Supp. 1324, 1327, *aff'd*, 461 F.2d 1266 (5th Cir. 1972).

The claim that EPA violated its own wetlands regulations and ignored the effect of the permit on No Bottom Marsh is inherent in the permit and is clearly not a ground for review which arose *after* the permit issued. Of similar import is petitioners' claim that the permit violates the Water Act in that the prescribed effluent limitations are inadequate. The adequacy of the effluent limitations and standards of performance contained in an NPDES permit are among the specific grounds for review under section 509(b)(1). All of the relevant facts were available at the time the permit was issued and nothing occurred thereafter which is material to the issue sought to be presented. The effect of Intervenors' project on surrounding properties was not only foreseeable but the subject of considerable argument and discussion during the course of protracted proceedings in the Town of Somers, before DEC and before the EPA. Petitioner Kipp himself raised the issue long before the NPDES permit issued (A10-A13).** To hold, as

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*Interior's refusal to review the permit on its merits is discussed in Point V, *infra*.

**Petitioners-appellants concede at p. 6 of their Reply Brief that all "new" issues were presented to EPA no later than May 28, 1974, two months before the permit issued.

petitioners urge, that the 90-day limitation period runs from the date a permitee first commences discharging would run counter to the express language of the statute and its manifest Congressional intent. In any event, here the record is clear that discharge by the permitee commenced no earlier than April 10, 1975 (93b). Accordingly, petitioners are barred even if their strained interpretation of the statute is accepted.

There are thus no "new" grounds warranting judicial review in this case. Petitioners seek to "boot-strap" themselves into court after having failed to act promptly and after having chosen, erroneously, to pursue their cause in the District Court. In fact, all of the grounds underlying the petition were asserted in the District Court action which was filed on January 8, 1975. Even if petitioners were unsure of the appropriate forum they could have sought review in this Court simultaneously with their filing in the District Court. Apparently recognizing their obligation to afford EPA at least 60 days notice before instituting a citizens suit under section 505(b) of the Water Act [33 U. S. C. § 1365(b)], petitioners filed an amended complaint in the District Court on April 21, 1975. Even this was more than 90 days before the filing of this petition.

Section 509(b)(1) of the Water Act bars petitions for review filed more than 90 days after the issuance of an NPDES permit unless based *solely* on grounds which arose thereafter. Here, *all* of the grounds asserted for review arose prior to the permit's issuance and, therefore, this petition is time barred.*

Petitioners' contention that EPA is estopped from asserting the limitation period of the statute by reason of its

*Intervenors do not agree with the Government's position that in the event the Court finds any one of petitioner's grounds for review to have arisen after the permit was issued that "new" ground may be considered. The statute is clear that a petition for review may be entertained if based *solely* on new grounds. The joinder of "new" grounds with "old" grounds divests this Court of jurisdiction.

failure to give them notice of the issuance of the permit is specious. Petitioners had actual notice in ample time to protect themselves. Moreover, EPA had no obligation to notify petitioners of the *issuance* of the permit as contrasted with the pendency of the proceeding and the doctrine of equitable estoppel does not apply absent evidence of affirmative misrepresentation by responsible agents of EPA upon whom petitioners relied. *See, Glus* v. *Brooklyn Eastern Terminal,* 359 U.S. 231, 235 (1959); *Federal Corp. Ins. Corp.* v. *Merrill,* 332 U.S. 380 (1947). No such claim is made here.

Equally specious are petitioners' contentions that (a) they only concluded their investigation of the record underlying the NPDES permit in mid-November 1974 and (b) they could not file a timely petition before the District Court dismissed their claim for lack of jurisdiction. Petitioners were represented by counsel throughout the many proceedings underlying the Heritage Hills development. That they changed attorneys in September 1974 and that their new counsel chose to procrastinate until July 31, 1975 to petition for review is unexplained and inexcusable. Also, counsel's failure to correctly construe the relevant provisions of the Water Act does not constitute a viable basis for tolling the statute of limitations.

POINT II

THE NPDES PERMIT IS BASED UPON SUBSTANTIAL EVIDENCE AND ADEQUATELY PROTECTS THE ENVIRONMENT.

The substantive basis for the petition for review is contained in the allegations that EPA "ignored the impact on the wetlands of No Bottom Marsh" and "never considered the presence of an aquifer, water supply, fishing area and marsh immediately downstream from the discharge pipe . . ."* These allegations are demonstrably untrue.

**See,* Petition dated July 30, 1975 paragraphs 5(c) and (d).

The EPA, upon receipt of the NPDES application, promptly drafted a proposed permit in accordance with "applicable federal and state water quality requirements" (18a). The draft permit was circulated to DEC for its consideration and for certification "that any . . . discharge will comply with the applicable provisions of Sections 301, 302, 306 and 307 . . ." of the Water Act [33 U.S.C. § 1341(a)(1)] (A4). This procedure was clearly in compliance with the statute which not only requires such certification, but contemplates that EPA will defer to and rely upon existing State permit programs. Conf. Rep. No. 92-1236, 92d Cong., 2d Sess. 138-139 (1972); S. Rep. No. 92-414, 92d Cong., 1st Sess. 69-71 (1971). This is especially true where, as here, the State standards are more stringent than the federal standards (18a) [33 U.S.C. § 1370]. *See, California ex rel. State Water Res. Control Bd.* v. *E. P. A.*, 511 F.2d 963, 965 (9th Cir. 1975).

DEC, which had already held extensive public hearings on the Heritage Hills project and was fully advised of petitioners' complaints, advised EPA that the permit should contain certain specific effluent limitations and monitoring requirements *beyond* those contained in EPA's draft permit (A20). DEC also forwarded to EPA copies of "party in interest" letters received by it and called EPA's attention to the public hearings held the previous Fall and to petitioners' letter of January 11, 1974 (A2) in which petitioners offered "to produce expert testimony as to the effect of [Intervenors'] discharge on the Brown Brook."

Petitioners communicated directly with EPA to oppose the application "for discharge of Pollutant Sewage into the 'Brown Brook'" because of the allegedly deleterious effect on their "wetlands," "water supply," "spring-fed lake," and "wells" (A10). Petitioners also complained directly to EPA about "irreparable continuing damage to the environment, existing water wells, reservoir and methods, the public health and welfare of the Town of Somers, N. Y.,"

the "intermediary trout stream," and "spring-fed water reservoir" (A12). The gravamen of petitioners' complaint then and now was and is that "nutrients (nitrates, phosphates and detergents) cannot be removed by tertiary treatment of the sewage from this housing development" (A12). In other words, petitioners complained to EPA that Intervenors' proposed sewage treatment plant would not adequately protect the environment from damage.

Neither EPA nor DEC ignored petitioners. Rather, their complaints were afforded careful consideration. EPA reviewed the DEC proceedings and found that *all* of the questions and objections raised by petitioners had been answered during the State public hearings (A14). EPA examined the DEC's decision of January 17, 1974 and determined that petitioners' contentions that (a) Brown Brook would be destroyed by the proposed discharge and (b) potable water would be adversely affected by the discharge, properly were rejected by DEC. Moreover, EPA found that:

> "In answer to the question as to whether nutrients will be sufficiently removed to prevent degradation of the stream it should be noted that [Intervenors] must comply with the effluent limitations in the NPDES permit which, if met, will sufficiently prevent such a problem from resulting due to the facility's discharge" (A14-A15).

The public hearings conducted by DEC and relied upon by DEC and EPA in issuing the NPDES permit constitute an extensive and detailed record which amply supports the effluent limitations prescribed for Intervenors' sewage treatment plant.

The expert testimony now offered by petitioners is *the same* as that proferred and received at the DEC hearings. Dr. Raul Cardenas, whose affidavits are relied upon by petitioners in an effort to establish the alleged deficiencies

in the NPDES permit (A84-A91), actually testified at length at the DEC hearings (Tr. 1403-1485).

Contrary to petitioners' contention, no effort was made to restrict testimony at the DEC public hearing. Petitioners', who appeared by counsel and participated in examining and cross-examining witnesses, moved formally to expand the hearing into one involving a SPDES permit under the then recently enacted amendments to the New York Environmental Conservation Law [N. Y. Environmental Conservation Law §§ 17-0701, 17-0703, 17-0801 *et seq.* (McKinney, Supp. 1975)] (Tr. 1152-7). Whereas this motion was denied, petitioners were permitted to and did thereafter offer their expert testimony on the very same subjects now sought to be reviewed (Tr. 1215-1517). Howard Kelly, a consulting engineer and community planner, testified about his studies of the Sun property and the Brown Brook drainage basin (Tr. 1215-1314); Erick Gidlund, a civil engineer, testified about water quality, stream flow, waste water, the capacity of Brown Brook and the effect of the proposed effluent discharge and the general environmental impact of the Heritage Hills project (Tr. 1315-1402); Dr. Cardenas testified about the water quality on the Sun property, the nature and quality of the effluent to be discharged by Intervenors, eutrophication, siltation, and the adequacy of the effluent standards proposed by DEC (Tr. 1403-1485).

It is clear beyond peradventure that both state and federal authorities actively participated in the formulation of the effluent standards prescribed in the NPDES permit and that they did so only after giving careful consideration to petitioners' objections.* Petitioners specifically were

*It is of no import that the objections were raised by petitioners Kipp and Sun and not by the others so long as it is established that the objections were, in fact, presented and considered. Scenic Hudson Preservation Conference v. F.P.C., 354 F.2d 608, 619 (2d Cir. 1965).

advised *before* the permit was issued that Intervenors were "required to design [their] treatment process to provide a final effluent that would be compatible with an intermittent stream," a significantly higher standard than would otherwise be required (19a, A22). They were advised that county health authorities were satisfied that downstream waters would not be adversely affected and that the public hearings had established "that there should be no adverse affect on water quality or on land use resulting from water quality downstream from the proposed discharge," including Sun's "wetlands" (A23).

In these circumstances, it cannot be said that EPA acted arbitrarily or capriciously or on the basis of anything other than a substantial record. EPA is vested with broad discretion in the highly technical area of water pollution control and its actions should not be disturbed in the absence of compelling necessity. *See, Citizens to Preserve Overton Park* v. *Volpe,* U.S. 402, 413-414 (1971). The proper scope of judicial review has been enunciated by the Eighth Circuit as follows:

> "[We] must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Union Electric Company* v. *E.P.A.,* 515 F.2d 206, 214 (8th Cir. 1975).

As in the Clean Air Act cases, after which the Water Act was modeled, judicial review is limited to consideration of whether EPA acted arbitrarily or capriciously or otherwise abused its discretion. *Natural Resources Defense*

Council v. *E.P.A.*, 507 F.2d 905 (9th Cir. 1974); *South Terminal Corp.* v. *E.P.A.*, 504 F.2d 646, 655-6 (1st Cir. 1974); *Texas* v. *E.P.A.*, 499 F.2d 289, 296-7 (5th Cir. 1974); *Buckeye Power, Inc.* v. *E.P.A.*, 481 F.2d 162, 170-1 (6th Cir. 1973).

In this case, the record of administrative proceedings establishes that EPA acted reasonably and on the basis of a substantial record. To the extent it is claimed by petitioners that the standards prescribed by the NPDES permit are being violated by Intervenors, there are ample remedies available under the statute, but they may be invoked only after notice to EPA and an opportunity is afforded for the agency to proceed [33 U.S.C. §§ 1319, 1365].* Such contentions are not properly before this Court on an original petition for review under section 509(b)(1)(F) of the Water Act [33 U.S.C. § 1369(b)(1)(F)].

This simply is a case where petitioners are dissatisfied with an administrative determination not because it is clearly erroneous, arbitrary or manifestly unreasonable but because they disagree with the result. They would have this Court substitute its lay judgment for that of DEC and EPA, the experts. They would have this Court accept the opinions of Dr. Cardenas and reject the opinions of the many engineers, biologists, planners, chemists and consultants who disagree with him and who regard the effluent limitations of the NPDES permit to be fully consistent with the Water Act and the regulations promulgated thereunder [38 Fed. Reg. 10834-5, 38 Fed. Reg. 13528-40 (1973)].

Intervenors' sewage treatment plant is a modern structure containing the very latest machinery and equipment

*Unlike Natural Resources Defense Council v. Callaway, —F.2d —(2d Cir. 1975) [Docket No. 75-7048 decided September 9, 1975] no notice was given prior to the commencement of suit and no notice has been given in accordance with E.P.A. regulations [40 C.F.R. § 135 (1973)]. *See,* Conservation Soc. of S. Ver., Inc. v. Sec. of Tran., 508 F.2d 927, 938 fn. 62 (2d Cir. 1975).

capable of treating waste materials in accordance with the most recent technological advances (Tr. 338-500). While secondary treatment of sewage is ordinarily sufficient to satisfy federal standards more stringent conditions were imposed on the permit here in dispute (18a-20a). There is no danger to the environment, there is no pollution, and petitioners are suffering no harm. If, indeed, the "horrors" of eutrophication, impure water, viruses and coliforms conjured up by petitioners are present in Brown Brook and No Bottom Marsh then EPA, DEC and petitioners have ample recourse against Intervenors. Such recourse might even include revision of the prescribed effluent limitations in accordance with general condition #2 of the NPDES permit (2a). But there is no present basis for either this Court or the District Court to question EPA's judgment in this matter or to interfere with the orderly review procedures, both administrative and judicial, set forth in the Water Act.* *See, Oljato Chapter of the Navajo Tribe* v. *Train, supra.* at 661-668.

POINT III

EXCLUSIVE JURISDICTION TO REVIEW THE ISSUANCE OF NPDES PERMITS IS VESTED IN THIS COURT.

The District Court dismissed the first and fifth claims contained in appellants' complaint on the grounds that it lacked subject matter jurisdiction (A35-A39). Both claims are predicated on the proposition that the NPDES permit should never have been issued because of alleged substan-

*EPA has the right and duty under sections 307-308 of the Water Act [33 U.S.C. §§ 1318, 1319] to investigate actual performance under NPDES permits and to enforce effluent limitations against discharges. Both civil and criminal penalties are prescribed for violators. Citizen suits are authorized but only *after* EPA has been given 60 days notice of an alleged violation and has refused to act [33 U.S.C. § 1365].

tive and procedural irregularities. Relying on the plain language of the statute, its legislative history and the cases which have construed its effect, the District Court quite properly held that *exclusive* jurisdiction is vested in the Courts of Appeals.

Appellants' contention that there is concurrent jurisdiction in this Court and in the District Court to review the validity of the NPDES permit is insupportable. Section 509(b)(1) of the Water Act [33 U.S.C. § 1369(b)(1)] grants this Court the power to review EPA action "in issuing or denying any permit under section 1342 [402]". This specific grant of authority precludes any interpretation other than the exclusivity of this Court's jurisdiction. As the Tenth Circuit held in *Anaconda Company* v. *Ruckelshaus,* 482 F.2d 1301, 1304-5 (10th Cir. 1973):

> "To allow review by way of injunction in the case at bar could only serve to cause delay and to take the case up in a district court removed from the scene is not appropriate either, for it could conceivably encourage forum shopping and the thwarting of procedures which Congress has carefully adopted. It follows then that where, as here, Congress has specifically designated a forum for judicial review of administrative action and does so in unmistakeable terms except under extraordinary conditions, that forum is exclusive."

Congress recognized the need for "even and consistent national application" of effluent standards prescribed in NPDES permits under section 402 of the Act and so specified that "any review of such actions" would be in the Court of Appeals. S. Rep. No. 92-414, 92d Cong., 1st Sess. 85 (1971). The Senate version of the statute provided that "[s]uits for review of the Administrator's action in approving or promulgating any effluent limitation

under section 301 or 302 or issuing or denying a permit under section 402 . . . would have to be filed in the Court of Appeals for the appropriate circuit." Conf. Rep. No. 92-1236, 92d Cong., 2d Sess., 147 (1972). The Senate version limited such review to 30 days after the challenged administrative action. The House version provided for review in the District Courts. The Conference substitute eliminated District Court review and extended the limitation period to 90 days.

In light of this legislative history the jurisdiction vested in this Court under section 509(b)(1) has been held to be exclusive in every case which has considered the matter. *Oljato Chapter of the Navajo Tribe* v. *Train, supra; Getty Oil Co. (Eastern Operations)* v. *Ruckelshaus,* 467 F.2d 349 (3rd Cir. 1972), *cert. denied,* 409 U.S. 1125 (1973); *Nader* v. *Volpe,* 466 F.2d 261 (D.C. Cir. 1972); *E. I. DuPont de Nemours & Co.* v. *Train,* 383 F. Supp. 1244 (W.D. Va. 1974); *American Paper Institute* v. *Train,* 381 F. Supp. 553 (D.D.C. 1974). Similarly, the cases which have construed parallel provisions of the Clean Air Act have reached the same conclusion. *Natural Resources Defense Council* v. *E.P.A.,* 512 F.2d 1351, 1355 (D.C. Cir. 1975); *City of Highland Park* v. *Train,* 519 F.2d 681 (7th Cir. 1975).

In an effort to avoid the clear meaning of Section 509(b)(1) of the Water Act appellants argue that concurrent jurisdiction is vested in the District Court by virtue of the Administrative Procedure Act ("APA") [5 U.S.C. § 701 *et seq.*] and the mandamus statute [28 U.S.C. § 1361]. While this Circuit has only recently interpreted the APA as providing an independent source of jurisdiction under section 505 of the Water Act [*Natural Resources Defense Council* v. *Callaway, supra; Conservation Soc. of S. Ver., Inc.* v. *Sec. of Tran., supra*], the APA, by its terms applies only when "there is no other adequate

remedy in a court" [5 U.S.C. § 704]. Here, other remedies exist and the APA is inapplicable. *Oljato Chapter of the Navajo Tribe* v. *Train, supra* at 663-5; *Getty Oil Co. (Eastern Operations)* v. *Ruckelshaus, supra* at 356. The mandamus statute is also inapplicable by its terms by reason of the fact that it relates only to non-discretionary or ministerial administrative actions. Here, the administrative actions of which complaint is made may not be so classified as the District Court quite properly noted (A38). *See, Plan for Arcadia, Inc.* v. *Anita Associates,* 501 F.2d 390 (9th Cir.) *cert. denied,* 419 U.S. 1034 (1974). Appellants challenge EPA's exercise of discretion in issuing an NPDES permit and not any ministerial failure on its part to act. Similarly, there is no general federal question jurisdiction under 28 U.S.C. § 1331 since Congress has provided a specific avenue for review as part of a comprehensive regulatory scheme. *See, Anaconda Company* v. *Ruckelshaus, supra* at 1304-5.

Appellants' reliance upon section 505(e) of the Water Act [33 U.S.C. § 1365(e)] is misplaced.* Section 505 deals solely and exclusively with citizen suits against third parties (*e.g.* permitees or other dischargers) who violate effluent limitations and suits against EPA for failure to perform non-discretionary acts. H.R. Rep. No. 92-911, 92d Cong., 2d. Sess. 133 (1972). Section 505 "is carefully restricted to actions where violations of standards and regulations or a failure on the part of officials to act are alleged." S. Rep. No. 92-414, 92d Cong., 1st Sess. 79 (1971). The gravamen of appellants' first and fifth claims falls squarely within the purview of section 509 of the Water Act [33 U.S.C. § 1369] which does not purport to preserve other statutory or common law rights of private litigants. Ac-

*Appellants also invoke section 511 of the Water Act [33 U.S.C. § 1371] which, by its very terms, has nothing to do with citizen suits.

cordingly, while there may be alternate bases of jurisdiction under section 505, there are no alternates to section 509. *See, Natural Resources Defense Council* v. *Callaway, supra; Natural Resources Defense Council* v. *Train,* 510 F.2d 692 (D.C. Cir. 1975).

POINT IV

APPELLANTS WERE GIVEN A REASONABLE OPPORTUNITY TO BE HEARD IN CONNECTION WITH THE ISSUANCE OF THE NPDES PERMIT.

Failing to block the NPDES permit on its merits, appellants seek to invoke the hallowed principles of procedural due process in an effort to force its revocation. They claim inadequate notice of its issuance and the denial of a fair opportunity to be heard. Neither claim is factually or legally sustainable.

First, appellants had actual notice of the Intervenors' plans for the sewage treatment plant and of Intervenors' applications for both a SPDES permit and an NPDES permit. They participated in the DEC hearings and sought to block approval. They were specifically advised of Intervenors' intention to apply for a SPDES permit and, following the filing of the application, they urged DEC to reject it. While it is conceivable that appellants were unaware of the EPA's public notice published in the *Peekskill Star,* they were certainly aware of DEC's notice published in the *Reporter Dispatch* which called attention to the pending NPDES application and DEC's duty to certify compliance with the federal standards set forth in the Water Act (61b). In fact, appellants registered their objections with both DEC and EPA prior to the issuance of the permit as well as thereafter. To claim inadequate notice in these circumstances is an affront to reason.

EPA's regulations required publication of notice "in local newspapers and periodicals, or, if appropriate, in a daily newspaper of general circulation" of EPA's "proposed determination to issue or to deny" a permit. 40 C. F. R. § 125.32 (1973). Neither the Water Act nor the regulations require the giving of any notice of the *issuance* of permits—only of applications therefor thus affording interested parties the opportunity to be heard. EPA met this requirement by publishing notice in the *Peekskill Star,* unquestionably a daily newspaper of general circulation within the geographical area of the discharge (A80-A83).

It is of little import that the *Peekskill Star's* circulation in Somers is "thin" since it is a daily of general circulation not only in Somers but in a somewhat larger area of northern Westchester County affected by the proposed discharge. Moreover, any technical defect in notice was certainly cured by DEC's use of the *Reporter Dispatch,* the local newspaper with the largest circulation in the area (A82), and by the fact of appellants' actual notice. *Committee to Save Lake Murray* v. *F.P.C.,* 515 F.2d 379 (D.C. Cir. 1975).

Unlike *Schroeder* v. *City of New York,* 371 U.S. 208 (1962); *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950) and *Walker* v. *Hutchinson City,* 352 U.S. 112 (1956) where interested parties were divested of substantial property rights without an opportunity to file damage claims for their losses, these appellants had actual notice and have not lost any rights they might otherwise have enjoyed. Like *National Equipment Rental* v. *Szukhent,* 375 U.S. 311, 315 (1964) there is no violation of due process here because appellants actually had complete and timely notice. Moreover, appellants were on "continuing notice" by virtue of their participation in Intervenors' project from its very inception. *Grunin* v. *International House of Pancakes,* 513 F.2d 114, 121 (8th Cir. 1975).

Cases like *Schroeder, Mullane* and *Walker* do not involve administrative proceedings in which the objectant is not a direct participant and need not be summoned. They involve direct deprivations of property and, therefore, the constitutional requirements of notice are more stringent. *Bank of Commerce* v. *Board of Governors*, 513 F.2d 164, 166 (10th Cir. 1975). Where, as here, appellants are afforded the *right* to participate and are not compelled so to do, notice by publication is permissible and personal notice is not mandated.

Appellants' claim of a constitutional infirmity inherent in EPA's failure to hold a further public hearing is similarly unfounded. Section 402(a)(1) of the Water Act [33 U.S.C. § 1342(a)(1)] requires only that *opportunity* for public hearing be afforded. There is no constitutional mandate that all administrative action requires public hearing. The matter is one of legislative discretion and here Congress left the matter to the EPA. EPA's regulations then in force, provided that public hearings be held only where the Administrator found "a significant degree of public interest" or where such a hearing was requested and sufficient basis therefor established [40 C.F.R. §§ 125.34(b), 125.34(c), 125.34(f) (1973)]. Here, there was no request for a public hearing before EPA* and no necessity for one can be established, the hearing before DEC having covered all elements of appellants' position.

There has been no violation of appellants' rights to procedural due process. They had ample opportunity to be heard; they were heard; their position was considered and rejected as insubstantial. They were not entitled to a second adjudicatory hearing as a matter of right. *See,*

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*Appellants point to Kipp's letter of May 28, 1974 (A12) as a demand for a hearing. Not only is the letter silent on the subject but it fails to satisfy the prerequisites of section 125.34(c) of the regulations. *See*, 38 Fed. Reg. 13537 (May 22, 1973). When Kipp wanted a public hearing he certainly knew how to ask (A10).

Anaconda Company v. *Ruckelshaus, supra* at 1306-7; 1 Davis, *Administrative Law Treatise* § 7.07 (1958).*

POINT V

THE REQUIREMENTS OF THE FISH AND WILDLIFE COORDINATION ACT WERE COMPLIED WITH.

The Fish and Wildlife Coordination Act states that whenever the waters of any stream or other body of water are to be "modified" under a federal permit or license, the licensing agency "first shall consult with the United States Fish and Wildlife Service of the Department of the Interior [16 U.S.C. § 662(a)]. The licensing agency is not obligated to follow any recommendations made by Interior but must give consideration to Interior's views. *Zabel* v. *Tabb,* 430 F.2d 199, 209 (5th Cir. 1970), *cert. denied,* 401 U.S. 910 (1971).

Here, EPA duly notified Interior of the NPDES permit application and solicited comments. Interior replied that it contemplated no action due to lack of personnel. Appellants charge that Interior's action was unlawful and, therefore, the subject permit should never have been issued. The fallacy in this argument lies in its consequences. Despite the good faith of EPA in affording Interior an opportunity to be heard and despite the complete absence of culpability on the part of Intervenors, appellants would have the Heritage Hills project aborted to await the availability of sufficient funds and sufficient interest on Interior's part to proceed. The inequity of such a result cries out for its rejection.

The Coordination Act simply requires EPA to "consult" with Interior; it does not require Interior to do anything. Thus, faced with limited appropriations and a heavy "case

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*Assuming a technical oversight (which Intervenors dispute) procedural defects in the administrative process which do not cause manifest prejudice are insufficient to void agency action. United States v. Schultz, 150 F.Supp. 303 (N.D.N.Y. 1956), *aff'd* 243 F.2d 349 (2d Cir.), *cert. denied,* 354 U.S. 921 (1957).

load" Interior adopted the position that it would pass on the merits of some, but not all, federal permit applications. *See,* 38 Fed. Reg. 13528, 13532-3 (1973); 39 Fed. Reg. 29552 (1974); Protecting America's Estuaries: Florida, Hearings Before a Subcomm. of the House Comm. on Government Operations, 93d Cong., 1st Sess., App. 4, Part C, at 1261, 1347-9, 1363 (1973).* As found by the District Court, it is implicit in the absence of a statutory mandate requiring Interior to comment on the merits of every permit application that Interior has discretion to determine how best to use its resources in the public interest (A42-A43).

Certainly, in view of EPA's own statutory obligation to protect fish and wildlife in setting standards for NPDES permits [33 U.S.C. § 1312(a)] it cannot be said that Interior's declination was unreasonable or arbitrary.

Appellants err in attributing to the word "consult" as used in the Coordination Act a special meaning *requiring* active participation by Interior. The word "consult" was used by Congress in its ordinary sense of seeking the opinion or advice of another. *Webster's New International Dictionary,* (2 ed. 1968). *See, Commissioner of Int. Rev.* v. *John A. Wathen Dist. Co.,* 147 F.2d 998, 1001 (6th Cir. 1945). EPA performed its duty and the policies of the Water Act as effectuated by EPA should not be frustrated by the claimed inaction of Interior.

Where, as here, there is little likelihood that appellants would prevail on the merits even if Interior reviewed the merits of the permit; where, as here, the injury to Intervenors would be severe if the permit were voided; and where, as here, the issue of "consultation" under the Coordination Act is highly technical and procedural rather than one of substance serving an overriding public interest, injunctive relief is inappropriate and the District Court did not abuse its discretion in refusing appellants' motion for

*Relied upon by the District Court (A40-A42).

an injunction *pendente lite. Conservation Soc. of S. Ver., Inc.* v. *Sec. of Tran., supra* at 938-9; *Environmental Defense Fund* v. *Tennessee Valley Authority,* 468 F.2d 1164 (6th Cir. 1972); *Sierra Club* v. *Hickel,* 433 F.2d 24 (9th Cir. 1970), *aff'd sub nom., Sierra Club* v. *Morton,* 405 U.S. 727 (1972). *Ohio ex rel Brown* v. *Calloway,* 497 F.2d 1235 (6th Cir. 1974) To enjoin EPA and invalidate the NPDES permit at this late date would irreparably harm the Intervenors who have expended vast sums of money on Heritage Hills and render uninhabitable the homes of the more than 100 families now living at the project site. To do this because Interior did not chose, in its discretion, to review the permit application before the permit issued would be manifestly unjust.

POINT VI

THE DISTRICT COURT SHOULD NOT HAVE ENTERED FINAL JUDGMENT.

Intervenors submit that the order of final judgment herein (1b) was improvidently granted. *Fed. R. Civ. P.* 54(b) provides for the entry of judgment upon multiple claims involving multiple parties only where there is "an express determination that there is no just reason for delay." Here judgment was entered against the federal defendants with their consent but without the consent of Intervenors. There is no evidence that the District Court actually exercised its discretion but, rather, it appears that judgment was entered routinely or as a courtesy to counsel. Contrary to this Court's direction in *Schwartz* v. *Compagnie General Transatlantique,* 405 F.2d 270, 275 (2d Cir. 1968) there was no marshalling of competing considerations. *See also, Campbell* v. *Westmoreland Farm, Inc.,* 403 F.2d 939, 941-2 (2d Cir. 1968).

Appellants' claim that Intervenors were required to obtain a permit from the Army Corps of Engineers under

section 404 of the Water Act [33 U.S.C. § 1344] remains to be tried. This claim involves the same witnesses, much of the same evidence and many of the same issues (including appellants' *laches*) as are presented by this appeal. Whereas the federal defendants are technically no longer parties they are intimately concerned with the trial issues which involve their actions in granting the application for the NPDES permit. Certainly, the issues now sought to be presented regarding the scope and purpose of the Water Act and its implementation by the various federal agencies concerned with water pollution control would better be resolved in a single appeal after trial rather than in the piece-meal fashion sought by appellants.

The appeal should be dismissed as interlocutory.

CONCLUSION

The original petition should be dismissed as untimely or, alternatively, on the merits as insubstantial. The appeal should be dismissed as improvidently granted or, alternatively, the District Court's judgment should be sustained in all respects.

Respectfully submitted,

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UNITED STATES ATTORNEY

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M. Bernandez 12-3-75

Attorney for

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1975

Attorney for

Marshall, Bratt et al

1:00 pm